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SAARI JUSOH

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZULKELFI MAKINUDIN JCA
SURIYADI HALIM OMAR JCA
[CRIMINAL APPEAL NO: J-05-121-1995]

C

14 AUGUST 2006

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Trafficking in cannabis - Trafficking by way of sale - Act of selling - Proof - Accused handed over drug to agent provocateur but had not received payment - Whether sale not completed - Whether arrest premature - Whether offence one of possession - Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (b), (c)*

D

WORDS & PHRASES: *"Selling" - Meaning and import - Whether to be strictly interpreted - Dangerous Drugs Act 1952, s. 2*

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The appellant had sought to sell some 3686 grams of cannabis to the agent provocateur ('PW7') for RM6,000, and has had five meetings with the latter for the purpose. The facts showed however that, whilst the appellant had seen the price money and had handed over the proscribed drug to PW7, he was arrested before he could receive the said RM6,000 from PW7. At the trial, the 'non-payment out' of the drug price notwithstanding, the learned judge found the appellant guilty of trafficking after applying the double presumptions in ss. 37(d) and 37(da) of the Dangerous Drugs Act 1952 ('the Act'). In this appeal, the prosecution conceded on the misdirection by the trial judge, but argued that there was sufficient evidence on record to establish a case of trafficking by way of sale under s. 39B(1)(a) of the Act read with s. 2 thereof. It was further contended, *albeit* quite belatedly, that the conviction ought to be confirmed – as – even if there was no "selling" of the drug, there was sufficient evidence to convict the appellant under s. 39B(1)(b) or (c) of the Act.

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Held allowing the appeal
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The word "selling" in s. 2 of the Act, appearing as it were in a penal statute, ought to be given a strict interpretation. (para 6)

(2) On the facts, to constitute the act of "selling" under s. 2 of the Act, there must have been an actual delivery of the drug by the appellant accompanied by the physical handing over of the agreed price by the agent provocateur in exchange. In other words, the transaction must have been complete. Anything short of this is insufficient. Needless to say, such a completed transaction did not take place in the present action because the trap was sprung too early. (para 10)

(3) The evidence of the prosecution put at its highest merely established an agreement to sell the proscribed drug but not an actual selling of the drug. It follows that the conviction of trafficking cannot stand. However, there was abundant evidence that the appellant had actual possession of the proscribed drug. Consequently, the conviction under s. 39B(1)(a) is quashed and substituted with a conviction under s. 12 read with s. 39A(2) of the Act. (para 20)

(4) The eleventh hour submission by the learned deputy on a conviction under s. 39B(1)(b) or (c) ought to be dismissed. The prosecution had fought this case throughout on the basis that there had been an actual sale. That is the case that the appellant had sought to meet by way of cross-examination, evidence and submissions. It would be an injustice now to permit the prosecution to change tack at this late hour and to mount a wholly different case altogether against the appellant. (para 21)

[Sentence of death set aside; court to proceed to hear arguments on sentence.]

A ***Bahasa Malaysia*** *translation of headnotes*

Perayu berhasrat untuk menjual 3686 gram cannabis dengan harga RM6,000 kepada agen provokatur ('PW7') dan untuk itu telah bertemu dengan PW7 sebanyak lima kali. Fakta bagaimanapun
B menunjukkan bahawa, walaupun perayu telah melihat wang untuk membeli dadah dan telah menyerahkan dadah terlarang kepada PW7, perayu telah ditangkap sebelum pembayaran dibuat kepadanya. Walaupun begitu, di perbicaraan, yang arif hakim mendapati perayu bersalah kerana mengedar dadah dengan
C menggunapakai anggapan berganda di bawah ss. 37(d) dan 37(da) Akta Dadah Berbahaya 1952 ('Akta'). Di rayuan di sini, pendakwaan mengakui bahawa terdapat salah arahan di pihak hakim bicara, namun bertegas bahawa keterangan yang ada pada rekod mencukupi untuk membuktikan suatu kes pengedaran melalui
D penjualan di bawah s. 39B(1)(a) dibaca bersama s. 2 Akta. Juga dihujahkan, walaupun agak lewat, bahawa sabitan harus dikekalkan – kerana – jikapun "penjualan" tidak wujud, terdapat keterangan mencukupi untuk mensabitkan perayu di bawah s. 39B(1)(b) atau (c) Akta.

E **Diputuskan (membenarkan rayuan)**
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Perkataan "menjual" di dalam s. 2 Akta muncul dalam satu
F statut keseksaan, dan kerana itu harus diberikan takrifan yang ketat.

(2) Di atas fakta, bagi menzahirkan perbuatan "menjual" di bawah s. 2 Akta, hendaklah ada penyerahan sebenar dadah oleh
G perayu yang diikuti oleh penyerahan harga yang dipersetujui oleh agen provokatur. Dalam lain perkataan, transaksi hendaklah disempurnakan sepenuhnya. Apa jua yang selain itu adalah tidak mencukupi. Tidak syak lagi bahawa transaksi yang sempurna sedemikian tidak wujud dalam kes semasa,
H disebabkan jerat yang dipasang diloncatkan terlalu awal.

(3) Keterangan pendakwaan, pada tahapnya yang paling tinggi, hanya membuktikan satu persetujuan untuk menjual dadah terlarang dan tidak penjualan sebenar dadah tersebut. Ianya
I mengikut bahawa sabitan pengedaran tidak boleh bertahan. Bagaimanapun, terdapat banyak keterangan bahawa perayu

mempunyai milikan sebenar dadah terlarang itu. Oleh hal yang demikian, sabitan di bawah s. 39B(1)(a) adalah dibatalkan dan diganti dengan sabitan di bawah s. 12 di baca bersama s. 39A(2) Akta.

(4) Hujah yang arif timbalan mengenai sabitan di bawah s. 39B(1)(b) atau (c) yang dibuat di saat-saat akhir harus ditolak. Pendakwaan telah mendakwa kes ini dari awal hingga akhir dengan berasaskan pengataan bahawa terdapat penjualan dadah oleh perayu. Itulah juga kes yang perlu dijawab oleh perayu melalui soal balas, keterangan dan hujah-hujah. Oleh itu, adalah tidak adil untuk membenarkannya mengubah haluan pada saat ini dan membangkitkan satu kes yang berlainan sama sekali terhadap perayu.

[Hukuman mati diketepikan; mahkamah akan mendengar hujah berkaitan hukuman.]

Case(s) referred to:
Asdanusi Daut v. PP [2004] 3 CLJ 669 CA ***(refd)***
Chiu Wing Wah v. Ong Beng Cheng [1994] 1 CLJ 313 SC ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Liew Sai Wah v. PP [1968] 2 MLJ 1 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Namasiyiam v. PP [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(dist)***
PP v. Alcontara [1993] 4 CLJ 112 SC ***(refd)***
PP v. Chua Chor Kian [1998] 1 MLJ 167 ***(refd)***
PP v. Manoharan Ratnasamy [1989] 1 MLJ 504 ***(ovrd)***
PP v. Mansor Mohd Rashid & Anor [1997] 1 CLJ 233 FC ***(dist)***
PP v. Mohamed Halipah [1981] CLJ 92; [1981] CLJ (Rep) 238 HC ***(ovrd)***
Richardson v. Bardenhagen Enterprise Pty Ltd [1971] Tas SR 307 ***(refd)***
Shariff Kadir v. PP [2003] 1 CLJ 863 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39A(2), 39B(1)(a), (b), (c)

Other source(s) referred to:
Halsbury's Laws of England, vol. 36, p 415, para 631
Maxwell on Interpretation of Statutes, 12th edn, p 239

For the appellant - Karpal Singh (Gobind Singh Deo with him); M/s Karpal Singh & Co
For the respondent - Wong Chiang Kiat; DPP

[Appeal from High Court, Johor Bahru; Criminal Trial No: 47-2-1992]

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

[1] The appellant was charged, tried and convicted of the offence of trafficking in a dangerous drug under s. 39B(1) of the Dangerous Drugs Act 1952 ("the Act"). He has appealed to us. We heard the appeal on 7 August 2006 and reserved judgment until today. The facts are fairly straightforward.

[2] According to the prosecution's case, on 8 September 1991 Chief Inspector Nordin bin Kadir (PW5) attended a briefing at which those present were informed that Detective Lance Corporal Chee Kar Wah (PW7) would act as an agent provocateur to buy some drugs. Later that day, five meetings took place between PW7 and the appellant. The first meeting was held at 8pm; the second meeting at about 8.15pm; the third meeting at about 9.10pm; the fourth meeting at about 10.25pm and the fifth and final meeting at 11.45pm. The first to the fourth meetings took place in the vicinity of Merlin Tower in Johor Bahru. At the first meeting PW7 was introduced to the appellant by an informer. At the second meeting some preliminary negotiations took place for the sale of cannabis by the appellant to PW7. At the third meeting an agreement was reached between the appellant and PW7 that the former would sell and the latter would purchase 4 kilograms of cannabis for the sum of RM6,000. However, the appellant wanted PW7 to show him the RM6,000 before the drug could be delivered. The fourth meeting took place at 10.25pm. At that meeting PW7 showed the appellant the RM6,000. At the same meeting the place at which the drug was to be handed over was agreed upon. It was to be the railway crossing along Tun Abdul Razak, Johor Bahru. The fifth meeting took place at the designated meeting point at about 11.45pm. This is what happened. PW7 saw the appellant coming along on foot. He was carrying a plastic bag. He went to a money changer's shop at which he placed the bag on the ground. He then went up to PW7 and asked him to go and pick up the bag. PW7 did so and returned to where the appellant was. PW7 then lit his cigarette lighter to check the contents of the bag. He found a substance which he suspected to be cannabis. Thereafter, PW7 lit his cigarette lighter once again. This was the pre-arranged signal. Upon seeing this, the police officers who were in the ambush party at the scene came up to the appellant and arrested him.

The drug was seized. Subsequent chemical analysis established it to be 3686 grams of cannabis. For completeness we must add that one other person was charged and tried with the appellant. He was acquitted and nothing turns on this as the prosecution has not appealed against that order.

[3] The learned trial judge found the appellant guilty on a joint application of the presumptions in s. 37(d) and (da) of the Act. The criminal Bar refers to this as the rule against double presumptions. It is derived from the landmark decision of the Federal Court in *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170. A conviction for trafficking based on those two presumptions is bad and must be quashed. The learned deputy however argues that despite this misdirection by the trial court the conviction should nevertheless be upheld as there is sufficient evidence on record to establish a case of actual trafficking under s. 39B(1)(a) of the Act. And it is this point that we really need to consider. For, if, as contended by the deputy there is overwhelming evidence to support the conviction then this court may affirm the conviction despite the misdirection.

[4] Now, the prosecution's case, both in the court below and before us, is that the appellant sold the drug in question to PW7 and thereby trafficked in it. Trafficking is an offence created by s. 39B(1)(a) of the Act. But there are other inchoate offences which are contained in s. 39B(1), which, for completeness says this:

> 39B. (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia:
>
> (a) traffic in a dangerous drug;
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> (b) offer to traffic in a dangerous drug; or
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> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
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> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

[5] So, the crucial question in this case is whether on the facts there had been a sale of the proscribed drug by the appellant to PW7. To answer that question we must interpret the word "selling" appearing in the definition of "trafficking" in s. 2 of the Act which provides:

> In this Act, unless the context otherwise requires:
>
> > 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

[6] Before we express our view on the matter, we must remind ourselves upon a matter of critical importance in relation to the interpretation of statutes. It is this. The word "selling" which we must interpret appears in a penal statute. It must therefore be given a strict construction. There are several authorities that support this proposition but it suffices that we cite three. In *Liew Sai Wah v. Public Prosecutor* [1968] 2 MLJ 1, Viscount Dilhorne quoted the following passage from *Halsbury's Laws of England* Vol. 36 p. 415 para. 631:

> It is a general rule that penal enactments are to be construed strictly and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt.

[7] The next authority is *Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469 where in the specific context of s. 2 of the Act, Edgar Joseph Jr. FCJ said this:

> … the drugs legislation is a piece of highly penal legislation and therefore any ambiguity in it should be resolved in favour of the subject …

[8] Lastly, in *Public Prosecutor v. Chua Chor Kian* [1998] 1 MLJ 167 where Suriyadi J referred to *Maxwell on Interpretation of Statutes* (12th Ed) at p 239 which reads:

> The principle applied in construing a penal Act is that if, in construing the relevant provisions, 'there appears any reasonable doubt or ambiguity', it will be resolved in favour of the person who would be liable to the penalty. 'If there is a reasonable interpretation which will avoid the penalty in any particular case', said Lord Esher MR, 'we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections.'

[9] Applying the approach of strict construction, we note that that s. 2 of the Act does not employ the expressions "agreement to sell" or "agreement to buy" to fall within the definition of trafficking. Accordingly, in our judgment, a mere agreement to buy or sell a proscribed drug is not an act of trafficking within s. 39B(1)(a) of the Act. Neither, we may add, do negotiations for a sale amount to the offence of trafficking within s. 39B(1)(a). Whether they are caught by other provisions of the Act is a matter that must await decision in some future case.

[10] On the facts of the present case, it is our judgment, that to constitute the act of "selling" within s. 2 of the Act, there must have been an actual delivery of the drugs by the appellant accompanied by the physical handing over of the agreed price by the agent provocateur in exchange. In other words, the transaction must have been completed. Anything short of this is insufficient on the instant facts as it would admit a more lenient; a more flexible; approach to the construction of a penal statute. And that, on the authorities already discussed, is impermissible. Needless to say such a completed transaction did not take place in the present instance because the trap was sprung too early.

[11] We now turn to address the three authorities relied upon by the learned deputy in support of his argument. But before we do so, we must point out that all three were decided before the Federal Court had handed down its judgment in *Muhammed bin Hassan v. Public Prosecutor* and in *Chow Kok Keong v. Public Prosecutor*. These two cases established several principles including

(i) the need to apply a strict construction to the provisions of the Act; and (ii) the requirement to address the context in which the definition of trafficking in s. 2 of the Act was sought to be applied.

[12] *Public Prosecutor v. Mohamed Halipah* [1981] CLJ 92; [1981] CLJ (Rep) 238 is the first case. There Yusof Rashid J said:

> It is common knowledge that the 'selling' and 'buying' transaction is complete when the parties to such sale have made an offer to sell a commodity at a certain price and the other has accepted such an offer at the said price. Thereafter it remains for the money to change hands which is not the vital part in the sale transaction for, a sale may yet be complete on credit.

[13] With respect, a "buying" transaction is not complete when an offer is made and accepted. In such a case, all that has happened is that an agreement to sell has been concluded. And that is something that the Act does not encompass in the s. 2 definition of trafficking. Further, the learned judge's approach appears to place on the words in s. 2 a broad, flexible and liberal interpretation. This, of course, is not in accordance with settled principles of construction. Hence it is with utmost regret that we are unable to agree with the view expressed in the above-quoted passage, being, as we are, entirely conscious of the eminence of the learned judge who made that statement.

[14] The next authority is *Namasiyiam v. Public Prosecutor* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241. There, Syed Agil Barakbah SCJ said this:

> With regard to common ground (2), the trial Judge in fact found each of the appellants guilty as charged under section 39B(1)(c) of the Act and convicted them accordingly. (See pages 209 and 312 of the Appeal Record). In his grounds of judgment in dealing with the defence evidence, the trial Judge expressed the view that there was more than sufficient evidence to find the appellants guilty of trafficking in the said drugs even under sub-section 39B(1)(a) of the Act so as to invoke the presumptions under section 37(d) and (da) of the Act. We agree with him. That is because of the wide definition of trafficking in section 2 which includes inter alia the act of transporting, carrying, sending and delivering etc.

[15] Now, if you look carefully enough at the report of that case, you will find that the prosecution's case was not that there had been a sale. It was simply not a case under s. 39B(1)(a). It was a case under s. 39B(1)(c). Hence, any comment by the trial judge in that case about a case having been made out under the former subsection was pure *obiter*. Also, the Supreme Court does not appear to have addressed its mind to the principle that the Act had to be strictly construed. In any event, in the light of the later decisions of the apex court, the *obiter dicta* in *Namasiyiam* must be treated with extreme caution and as being wholly limited to the facts of that case.

[16] The third case is *Public Prosecutor v. Mansor bin Mohd Rashid & Anor* [1997] 1 CLJ 233. In that case, Chong Siew Fai CJ (Sabah & Sarawak) applied *Public Prosecutor v. Mohamed Halipah* and said this:

> It is in evidence that on 31 July 1991 in the house No 129, there was discussion between the first respondent and PW9 about the supply of ganja, the first respondent told PW9 of the inadequacy of supply and that he (the first respondent) had only one kilogramme of ganja and the price was RM1,500. PW9 having agreed to the price, the first respondent directed the second respondent in Kedah dialect: 'Deris, pi siapkan barang'. The second respondent then went to room 'K' and took out the package of cannabis. All these constitute clear evidence of sale or supply within the definition of 'trafficking'. See *PP v. Mohamed Halipah* [1982] 1 MLJ 155 where the charge was on sale of drugs; and apart from the admission in the cautioned statement, the material facts were, to a significant extent, similar. *PP v. Tahir bin Kassim* [1985] was another case involving the element of negotiation for the sale of dangerous drugs. Mohd Dzaiddin J (as he then was) found that the defence had not, on the balance of probabilities, cast any doubt on the truth of the prosecution's case 'about the negotiation for the sale of drug by the accused ...' See also *PP v. Manoharan a/l Ratnasamy* [1989] 1 MLJ 504; *Teh Geok Hock v. PP* [1989] 3 MLJ 162. All these cases, it must be noted, dealt with situations after the close of the defence's case.

[17] With respect, a careful reading of the judgment in that case shows that the prosecution's case there was one of supplying drugs and not selling them. So the observation about there having been a sale was pure *obiter dicta*. In any event, the approach to the construction of s. 2 definition of trafficking appears to be

broad, liberal and flexible: not strict. Lastly, the decision of the High Court at first instance in the case of *Public Prosecutor v. Manoharan a/l Ratnasamy* [1989] 1 MLJ 504 (referred to by the learned Chief Judge) is plainly wrong as the definition of "trafficking" in the Act does not include mere negotiations. What the High Court had done in that case was to have read words into the definition of trafficking in the Act. This is clearly impermissible. Thus, in *Richardson v. Bardenhagen Enterprise Pty Ltd* [1971] Tas SR 307, Burbury CJ said:

> The dividing line between impermissible filling in of legislative gaps and spelling out by interpretation of a whole statute, something necessarily implied within its expressed language, is sometimes a fine one. Parliament may, of course, express its intention by necessary implication from the words it uses. This principle may often be called in aid where general statutory powers are given and to give effect to the clear legislative purpose incidental powers will be implied. It has been called in aid to introduce by implication the rules of natural justice where a tribunal is given statutory jurisdiction to determine rights. But what is implied must not conflict with the express language of the statute. It must be within it and incidental to it … *Particularly in a penal statute the distinction must steadily be borne in mind between something which is by implication part of what is expressed, and something which, by inference, the court concludes the legislature has simply failed to provide for or overlooked* … If, by permissible processes of statutory interpretation, *the court cannot* say that what is omitted is necessarily implied within the language it cannot *legislate by filling in gaps which the legislature has left. That proposition applied with particular force to penal statutes.* (emphasis added.)

We would add that this passage was applied with approval by our Supreme Court in *Chiu Wing Wah v. Ong Beng Cheng* [1994] 1 CLJ 313 and by the Federal Court in *Public Prosecutor v. Alcontara* [1993] 4 CLJ 112.

[18] This court has, acting on the strength of *Muhammed bin Hassan v. Public Prosecutor* and *Chow Kok Keong v. Public Prosecutor*, held on at least two occasions that facts that established mere negotiations did not constitute the offence of trafficking by sale within s. 2 of the Act so as to come within s. 39B(1)(a). These are *Asdanusi Daut v. Public Prosecutor* [2004] 3 CLJ 669 and *Shariff Kadir v. Public Prosecutor* [2003] 1 CLJ 863. Of these, the Public

Prosecutor's further appeal to the Federal Court in the former case *(Asdanusi Daut)* was dismissed. Although no written judgment is available, it is quite clear that the apex court approved of our approach to the construction of s. 2 of the Act.

[19] In the course of argument the learned deputy submitted that there was in fact a sale in this case. When we asked him when the sale had taken place, he said that it was at the fourth meeting. He was then asked: what if after the fourth meeting the appellant never showed up for the fifth meeting but was seen elsewhere with the bag in question, could he have been convicted for trafficking by sale? After careful reflection the learned deputy very fairly gave a negative response to our question. However, he then sought to argue that the sale had taken place at the fifth meeting but was unable to say why that was so apart from the fact that the drug had been delivered to PW7. But he had perforce to concede that no money had exchanged hands and hence there was no sale.

[20] Now, applying the law earlier discussed to the facts of the present case, we are satisfied that the evidence of the prosecution put at its highest merely established an agreement to sell the proscribed drug but not an actual selling of that drug. It follows from what we have said thus far that the conviction for trafficking cannot stand. However, there is abundant evidence that the appellant had actual possession of the proscribed drug. In these circumstances we have no alternative but to quash the conviction under s. 39B(1) and substitute it with a conviction under s. 12 read with s. 39A(2) of the Act. The sentence of death is set aside.

[21] Before we conclude there are two matters which we must mention. First, the eleventh hour submission by the learned deputy that even if the evidence did not establish "selling" of the drug, there was sufficient evidence to convict the appellant under either s. 39B(1)(b) or (c). He then invited us to affirm the conviction on that ground. We regret that we are unable to accept this invitation. The prosecution had fought its case throughout on the basis that there had been an actual sale. That is the case that the appellant had sought to meet by way of cross-examination,

A evidence and submissions. It would be an injustice for us now to permit the prosecution to change tack at this late hour and to mount a wholly different case altogether against the appellant.

[22] The other is a submission made by the appellant that the B evidence of his conversations with PW7 was inadmissible because it had not been shown that PW7 was a police officer. Neither had PW7 taken down the statements made by the appellant at the meetings in question. In the light of what we have said earlier we find it unnecessary to deal in any depth with this submission. C But we must at once say in fairness to the prosecution that on the material before the trial court it had been proved beyond a reasonable doubt that PW7 was a police officer.

[23] We will now hear arguments on sentence.

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